

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

No. 76-5415

(A-812)

ALVIN OLANDA GILBERT,)
 Petitioner,)
))
versus)
))
UNITED STATES OF AMERICA,)
 Respondent.)

RECEIVED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Motion For Leave To Proceed In Forma Pauperis
And On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

AND NOW COMES the Petitioner, Alvin Olanda Gilbert, who respectfully requests that the Honorable Court issue the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW.

The opinion of the Court below is reported at 537
F. 2d 118 and was entered on August 26, 1976 1976.
A copy of the same was attached to this Petition as Exhibit A,
post page 11. Motion for extension of time in which to
file Petition was granted and time given until October 15, 1976.

Jurisdiction.

The Opinion of the Court below was entered on August 26,
1976. Extension of time to file Petition was granted and given until
October 15, 1976. This Petition is mailed to the Clerk of this Court
on September 16 1976. 28 USC 1254 (1).

QUESTIONS PRESENTED.

1. When a statute is ambiguous as to the appropriate unit of prosecution, should ambiguity be resolved in favor of lenity for the accused in the light of BELL V. UNITED STATES, 349 US 81 (1955)?
- 2-A. Since the alleged crime occurred in Houston, Texas, and there existed adequate State criminal laws to embrace the purported course of conduct of this Petitioner, then, in the light of United States Attorney Bulletin, April 18, 1969, Vol. 17, No. 15, pp. 360-61, why did the Federal Government invade and violate the rights of the People of the State of Texas as guaranteed to them by United States Constitution, Amendments 9 and 10?
2. Whether there is a conflict between the Fifth Circuit in United States v. Gilbert, 537 F. 2d 118 (1976), and the District of Columbia Circuit in United States v. Gallo, _____ F. 2d _____, Appeal No. 75-2095, August 26, 1976?
3. Where the Grand and Petit jurors are chosen only from a list of Registered Voters and other qualified non-voters are systematically excluded from such lists, has this Petitioner been deprived of the guarantees under the Sixth Amendment of the United States Constitution?
 - (A) Does the Constitutional guarantee that an accused person shall be tried by an "impartial" jury mean that only registered voters are "impartial" and that non registered voters are denied the right to sit as Grand and Petit jurors because they are not impartial because they choose to exercise the Constitutional and legal right not to register to vote?

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment VI, provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

(Emphasis added.)

United States Constitution Amendment IX, provides in part:

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X, provides in part:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(Emphasis added.)

STATUTES INVOLVED.

Section 659, Title 18, United States Code, provides in part:

"Whoever . . . steals, or unlawfully carries away . . . with intent to convert to his own use any goods . . . which are a part of . . . an interstate . . . shipment . . . or

"Whoever . . . has in his possession any such goods . . . knowing the same to have been . . . stolen . . ."

(Emphasis added.)

Section 1861, Title 28, United States Code, provides in part:

"It is the policy of the United States that all litigants in Federal entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

(Emphasis added.)

STATEMENT OF THE FACTS.

Two shipments of steel arrived at the Houston Barge Terminal facilities operated by General Stevedores, Inc., in Houston, Texas, on or about March 28 and 30, 1974. On April 3, 1974, an inventory was taken and it was discovered that about 6 coils of steel were missing... two from one shipment and 4 from another. It is conceded that the steel was moving in interstate commerce at the time the 6 coils disappeared.

It was developed through testimony of various witnesses that the defendant-Petitioner, the owner of a truck-for-hire, is alleged to have arrived in a trailer truck (38-39 Supplemental Record), but the testimony of the witness, Mr. Doyle Tatom, never said he saw the petitioner nor did he identify the Petitioner's truck. (SR 38-39). Thus, there is no positive identification as to this Petitioner on April 2, 1974.

It is not of record who moved the 6 coils from the Houston Barge Terminal Facilities, or when the coils were moved to the yard of the Astro Valve Supply Company in another part of Houston. The record reflects that Robert Denley, an employee of the petitioner, loaded the six coils onto another truck (SR 90) and transferred them to Odell Michel's warehouse. (SR 91). The Petitioner and another employee, Arthur Jones, was also present and helped in the loading of the coils of steel. A forklift operator, I.D. Johnson, there loaded the coils onto two different trucks belonging to Allstate Trucking Co. (SR 107-110) and the steel was taken to the depot of the latter company. (SR 116-117). Some time thereafter, on or about April 8, 1974, the coils were found by FBI agents or other law enforcement agents still on the Allstate Trucking Company trucks parked at the Allstate Trucking company depot. It is conceded that the coils of steel had a value in excess of \$100.00.

FBI Agent Russ testified that he had interviewed the Petitioner at his place of business and had warned him of his rights. But there is no signed waiver of record to verify such claim.

The Petitioner told agent in the beginning that he did not know anything about anything and did not want to become involved. Later the Petitioner phoned the agent and told him that he had lied about not knowing anything about the steel, but that he was innocent and would tell the agent exactly what he knew about the steel. He told the agent that he had not stolen the steel and that he did not know the steel was stolen when he had agreed to become involved. It was the position of the Petitioner that a man named "George" had come to his place of business, 'Progressive Truck Line,' and asked, "Do you have a tractor for hire?" The Petitioner said that he would lease his truck only if he or his drivers were also employed to do the driving. George is supposed to have said that he agreed to that and needed someone to move his load of steel immediately because it was standing uncovered on his truck on the roadway because his tractor was not working. And if the steel got caught in the rain it would quickly rust and be ruined. A price of \$300.00 was agreed upon and a contract signed. The Petitioner agreed to move the load to his friend's yard, Astro Valve Supply Company in Houston. George is alleged to have said that he would make arrangements for the steel to be moved as quickly as possible. The Petitioner said that he had the trailer dollyed up and drove his tractor under it and hauled the steel away. The Petitioner insisted that he did not know the steel was stolen. The Petitioner told the agent that later he received a phone call from George who told him that the steel should be moved and the Petitioner did as he was instructed - moved the steel to Michel's warehouse and then transferred it to the Allstate Trucking Company carriers. The Petitioner reiterated that he was innocent; that he had not stolen the steel and had no knowledge that the steel was "hot cargo". (SR 147-155)

The judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on August 26, 1976, and the Petitioner obtained an extension of time in which to file his Petition for writ of certiorari until October 26, 1976. This Petition is timely filed and mailed to the Clerk of this Court on the date of September 16 19 76. - 4 -

SUMMARY OF ARGUMENT ONE.

That a person convicted of violating 18 USC 659 cannot legally be subjected to cumulative punishment for the simultaneous theft and possession of one load of steel belonging to different companies.

ARGUMENT.

In this case, the Government - merely for purposes of aggravated punishment and to enhance the chance to get a conviction - charged this Petitioner with multiple thefts and multiple possessions arising out of a single episode which involved one load of steel belonging to two different companies. The alleged theft(s) are said to have occurred on April 2, 1974; the alleged possession(s) are said to have occurred on April 5, 1974.

The files and records reflect that five coils of steel were stolen from the same place at the same time; the five coils of steel were later found at the same time and place; It is admitted that the rolls of steel were the property of two different companies and were moving in interstate commerce at the time of the incident.

It has been held over and over by this Supreme Court that it is impermissible for the Government to carve more than one punishable offense out of a single incident affecting more than one person or object at the same time. BELL V. UNITED STATES, 349 U.S. 81 (1955).

The records show that the Court sentenced the Petitioner to 7 years as to Counts 1 and 2, to be served "concurrently"; 7 years as to counts 3 and 4, to be served "concurrently" with each other, but consecutively to the sentences imposed as to counts 1 and 2. Counts 1 and 3 refer to "Theft" on April 2, 1974; Counts 2 and 4 refer to "possession" on April 5, 1974. It would take an Einstein to unravel the logic which the Courts below used to justify a consecutive sentencing.

If Congress had desired to make the simultaneous theft and consequential possession of such objects separately punishable it had the will. But the statute does not expressly permit such cumulative punishment when the act embraces more than one person or objects affected by a simulated or simultaneous and contemporaneous theft and concurrent possession of 5 rolls or coils of sheet steel.

The Government has mistakenly used the two companies as the basis for the consecutive punishment when the facts clearly reveal that the indictment has as its object the 5 rolls or coils of sheet steel - belonging to the two companies - but stolen and possessed by the accused at the same time and place. The crime was continuing in nature and was one punishable offense. Bell, supra.

While it is true that a person may momentarily possess stolen goods without having stolen them, it is somewhat of a physical impossibility for a man to steal several tons of steel, load it upon his truck and then be said not to have "possessed it at the same time of the theft."

In re Snow, 120 US 274, where a man was convicted of living with more than one woman at the same time for an extended period of time. This court held that the time continuum did not authorize multiple punishment for each woman which co-habitated with the accused.

United States v. Universal Credit C.I.T. Corp., 344 U.S. 218, is a case where this Court held that the continuing violations of the Fair Labor Standards Act was one punishable offense.

Bell v. United States, 349 US. 81 (1955), the interstate transportation of two women at the same time was one punishable offense.

This Petitioner has 7 years too much time to serve and this Court should correct the sentence for the sake of Justice. US Const. Amend. V. See Exhibit B, post page 22

CONCLUSION OF ARGUMENT ONE.

When a defect in the sentence is apparent from the record, as here, it is proper for this Court to resolve the issue rather than to require the Petitioner to remit a Rule 35 Motion in the District Court which has already indicated a latent hostility in the length and manner of imposition of punishment, or the trial Court has a minimal understanding of the laws in this particular case.

As was so aptly said in BARTONE V. UNITED STATES, 375 US 52:

"(i)t is more appropriate, whenever possible, to correct errors reachable by the appeal than remit the parties to a new collateral proceeding."

WHEREFORE, on this particular point of law, Will the Office of the Solicitor General generously Confess Error?

SUPPLEMENTARY QUESTION TWO-A.

2-A. Since the alleged crime occurred in Houston, Texas, and there existed adequate State criminal laws to embrace the purported course of conduct of this Petitioner, then, in the light of United States Attorney Bulletin, April 18, 1969, Vol. 17, No. 15, pp. 360-61, why did the Federal Government invade and violate the rights of the People of the State of Texas as guaranteed to them by United States Constitution, Amendments 9 and 10?

SUMMARY OF ARGUMENT 2-A.

That the alleged conduct of this Petitioner, if criminal, should have been prosecuted by the State of Texas in the light of THOMPSON V. UNITED STATES, 400 US 17 (1970).

ARGUMENT 2-A.

The Chief Justice of this Court has often been heard to complain that the Federal courts are overburdened. This case is one more example why this is so. For example, the Petitioner is alleged to have been involved in the theft and possession of stolen property, several coils of steel from a place of business in Houston, Texas, and found in Houston, Texas. All of such accusations, if supported by facts, would make out a clear series of violations under Texas Criminal Laws. It is true that thus far, there has been no State prosecution, but there is no guarantee that the State of Texas will not at some coming future date begin criminal proceedings against this Petitioner.

The files and records are silent and do not show that any Assistant Attorney General and the local State Prosecutor entered into any conversations, negotiations, or agreements prior to the initiation of the Federal prosecution. There is not of record any written approval, memorandum, notation, or anything written to show beyond a reasonable doubt that the Appropriate Assistant Attorney General gave specific approval for this Petitioner to be prosecuted by the Federal authorities and that the local state authorities agreed in writing not to prosecute in the future. See Thompson v. United States, 400 US 17 (1970). There is no waiver of record. The 9th and 10th Amendments of the US Constitution guarantee that this Petitioner shall be subject to the police powers of the State of Texas and of the People of the State. (See: Exhibit D, post p. 13)

Since the coils of steel were moving in transit and had not reached their destination when "stolen", does not, per se, give the Federal Government exclusive jurisdiction of the matter.

For example, what are the "most compelling reasons" which are or were present to prevent the state of Texas from prosecuting this Petitioner? Surely, the State of Texas could have received the evidence from the FBI. As a matter of facts, the Petitioner is of the opinion that one of the employees of the Houston Facilities found the steel in the Allstate Trucking Company Yards and called the police. The FBI arrived and, as usual, seeking all the glory, brushed aside the local authorities and rammed through a federal prosecution without any regard to the rights of the State of Texas.

This Petitioner is not suggesting that prosecution by the State of Texas would be a Rose Garden - the facts indicate that just the contrary would be true, because sentences of up to 1500 years are not at all unusual in the State of Texas criminal Courts.

What this Petitioner is contending is that there did not exist and there does not yet exist any compelling reason why this Case should be in a Federal Court. . . . The State had adequate legal machinery to prosecute theft and possession of stolen merchandise having a value in excess of \$100.00 and it carries a rather stiff penal sentence.

The time has got to come when the Federal Government can nudge in and horn out the law enforcement officers of the several states. Especially is this true, when Exhibit C, post p. 13, clearly shows that in cases involved with 18 USC 659, there must be compelling reasons for federal prosecution. The mere fact that a crime touching coils of steel which were stolen prior to arrival at the destination and the local police have a complete array of legal procedures to apprehend, prosecute and convict and imprison the accused, does not without more give this Federal Government, already obviously over-bloated, the right to usurp the rights of the State of Texas. The Petitioner argues that under the 9th and 10th Amend. US Const. the State of Texas didn't give up jurisdiction

SUMMARY OF ARGUMENT TWO.

That there is a serious conflict between the Fifth Circuit in this case and the District of Columbia Circuit in the case of United States v. Gallo, F. 2d _____ (Appeal No. 75-2095, August 26, 1975)

ARGUMENT TWO.

The statute which this Petitioner is charged with violating provides in part:

"Whoever * * * has in his possession any such goods * * * knowing the same to have been stolen * * *"

(Emphasis added)

In charging the jury as to how it should determine whether Mr. Gilbert knew the steel was stolen the court gave an instruction which was at odds with other Circuits. The Petitioner contends that 18 USC 659 prohibits possession of stolen goods knowing them to have been stolen. The jury should have been told that actual knowledge was required under the statute

There are several federal cases which state that proof of actual knowledge is required. United States v. Fields, 466 F. 2d 119 (2 Cir., 1972), involved a conviction under 18 USC 659. In the Fields case the court held that it was error to instruct the jury that they could find the defendants guilty if they "knew" that the goods were stolen . . . from evidence which tends to prove such knowledge 466 F. 2d at 120. Thereafter, the Government was required to prove that the defendants "actually knew" that the goods were stolen properly. Id. See also United States v. Mitti, 444 F. 2d 1056 (7 Cir. 1971). Cf. United States v. Jacobs, 475 F. 2d 270 (2 Cir.,) cert. den. 414 US 821 (1973).

In this case the Court below understated the full degree of proof required. The statute requires proof that the accused knew that the goods were stolen. The files and records do not show that this Petitioner had such actual knowledge. United States v. Gallo, _____ F. 2d _____ (D.C. Cir., Aug. 26, 1976)

The files and records do not show that the jury was given reasonable notice that would alert the Petitioner to realize that the steel was stolen. The instructions as given permitted a conclusion of knowledge of facts which would or should put a reasonable man on notice by passes the degree of knowledge required by 18 USC 659.

The Government failed to prove that the Petitioner knew that the goods on his truck-for-hire was stolen or that he was under a duty to alert the police that he had suspicion that the steel was stolen, or, having reason to believe that the steel was stolen, he willfully neglected to exercise reasonable prudence and caution as would an innocent person.

Many courts have stated the rule to require "exclusive" possession, for example: United States v. French, 470 F. 2d 1234, 1243, n. 19 (1972), cert. den. 410 US 909 (1973). In this case the steel was not found on the property of the accused. It was found on the property of another un-indicted person.

The Petitioner has a license issued by the State of Texas to haul steel and other commodities on his truck-for-hire. He had the legal right to transport the steel found on his truck, even if it were stolen, so long as he had no knowledge of its character. The records do not show that he did not have lawful authority to lease his truck to any citizen for hauling steel, ashes, tomatoes, etc. The Waybill and Transfer Orders do not show that this man did not have a lawful right to haul such steel to the location where it was found.

Suppose that a taxi cab is stopped and the police find hard narcotics jammed behind the back seat. The driver may be questioned, but as soon as he shows his Trip Sheet to prove that there had been several passengers in the back seat, the focus of the investigation turns away from the taxi driver and the taxi company. In this case, the focus turned on the accused and because he was an ex-felon, the police turned no further and gave him a case.

The files and records do not reveal that there is not of record any Order, Waybill or Transfer Order signed by "George" giving

the Petitioner lawful authority to haul the steel.

In this case there is not one bit of evidence linking this Petitioner with the theft or knowing possession of stolen steel. No eye witnesses, no fingerprints, no tire tracks, absolutely nothing! The sole evidence in the chain is that some stolen steel was found in the yard of the Allstate Trucking Company - admittedly not the property of this Petitioner.

His truck-for-hire is in the same protected category as are all public carriers, such as Greyhound Bus, for example. To uphold this conviction is tantamount to opening the door so that any public carrier on which contraband or stolen merchandise be found would be liable for criminal prosecution - be it State or Federal prosecution.

Under the protection of the Commerce Clause of the United States Constitution and the Interstate Commerce Commission, its rules and regulations, this Petitioner is at least entitled to a new trial.

SUMMARY OF ARGUMENT THREE.

That under the provisions of US Constitution Amendment VI and in the light of 28 USC 1861, it was gross error for the Petitioner to be indicted and tried by jurors who were selected only from a List or Master Wheel of Registered Voters only.

Apparently counsel in the court below failed to raise objection to the manner in which the grand and petit jurors was selected and the bodies composed. However, since the Petitioner raises a matter which is of Constitutional dimensions, this Court has power to inquire into the substance thereof. In a nutshell, he contends that the manner in which grand and petit jurors are selected in the district below is in direct contravention of United States Constitution, Amendment 6 and 28 USC 1861, for the clear cut reason that by selecting such persons only from one source - List of Registered Voters - the Jury Commissioner deliberately and systematically excludes other equally qualified and 'impartial' persons whose name is not on such Voter Registration list.

By deliberately and systematically selecting grand and petit jurors only from one source - the list or Master Wheel of Registered Voters - the Jury Commissioner categorizes such persons as being "impartial" as required by the Sixth Amendment, while at the same time he negatively classifies non registered voters as not being 'impartial' and thereby not qualified to meet the Constitutional standards of impartiality.

A person may have each and every qualification to be a grand and petit juror in the district below, but even possession of such qualifications means nothing merely because such person has chosen to exercise his Constitutional and legal right not to register to vote.

Are we to say that non registered voters are to be disqualified to sit as grand and petit jurors, although they have every other quality? Is our system of justice to be coercive and force people who do not desire to vote either vote or lose the Constitutional and legal right to be chosen as a grand and petit juror?

Section 1861, Title 28, United States Code, states in part:

"* * * It is further the policy of the United States that ALL citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have the obligation to serve as jurors when summoned for that purpose." (Emphasis added.)

Under the present prevalent system in effect in the district below "all citizens" do not have the opportunity to be considered for service on the grand and petit juries. Under the prevailing system in the district below they do not have "the obligation" to serve. Under the system in effect in the court below they can never be "summoned" for such purpose. Why? Merely because they have chosen to exercise the Constitutional and legal right not to register to vote and by the exercise of such citizen right, the jury Commissioners in the district below unconstitutionally and unlawfully deprive such persons of

1. Opportunity to be considered for service on grand and petit juries

2. Obligation to serve as jurors ; and
3. Chance to be summoned for such purpose.

The United States Constitution, Amendment Six, merely and specifically guarantees that the trial shall be by an "Impartial" jury; there is no declaration nor limitation or restriction that the trial of persons accused of crime shall be by "Registered-voters (who are impartial) jury".

The Petitioner would cite and rely on TEST V. UNITED STATES, 420 US 28 (1975); TAYLOR V. LOUISIANA, ____ US ____ (1975); PETERS V. KIFF, 407 US 493 (1973); UNITED STATES CONSTITUTION, AMENDMENTS V and VI; 28 USC 1861, et seq.

CONCLUSION.

WHEREFORE, for any or all of the foregoing reasons it is submitted that this Petitioner is, or may be, entitled to the grant of the Writ of Certiorari.

Respectfully submitted,

Alvin Olanda Gilbert
ALVIN OLANDA GILBERT, Petitioner

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Dated and mailed: September 16 19 76.

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THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 118.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1976. On September 8, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including October 15, 1976. The petition was filed on September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be punished under 18 U.S.C. 659 for both theft of goods and possession of the same goods.

- 2 -

2. Whether theft of goods from separate interstate shipments forms a single offense.

3. Whether the federal prosecution of petitioner was barred because his acts may also constitute violations of state law.

4. Whether federal juries may be drawn from voter registration lists.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of theft from interstate shipments (Counts 1 and 3), and of two counts of possessing goods stolen from interstate shipments (Counts 2 and 4), in violation of 18 U.S.C. 659. He was sentenced to concurrent terms of seven years' imprisonment on Counts 1 and 2, for theft and possession of stolen goods from one interstate shipment, to be followed by concurrent terms of seven years' imprisonment on Counts 3 and 4, for theft and possession of stolen goods from a second interstate shipment. The court of appeals affirmed per curiam (Pet. App. A).

The government's evidence showed that on March 28, 1975, a shipment of sheet steel coils from Ecorse, Michigan, arrived by rail and was unloaded at the terminal facilities operated by General Stevedores, Inc., in Houston, Texas (Tr. 4-6). This shipment was consigned to the White Star Steel Company in Houston

(Tr. 4). Two days later, a shipment of galvanized steel coils from Martin's Ferry, Ohio, arrived by barge at the same facility and was placed in the warehouse on April 1 and 2 (Tr. 6-8). That steel was consigned to Carrier Air Conditioning Company in Tyler, Texas (Tr. 7).

Between midnight and 1:00 A.M. on the morning of April 3, 1975, a trailer truck was observed near the General Stevedore warehouse (Tr. 38). The General Stevedore yard was enclosed by a fence and trucks were not normally allowed to remain in that area overnight (Tr. 25). No truck had been in the yard earlier that evening (Tr. 35-36).

An inventory the following morning revealed that four coils of the sheet steel from Michigan and two coils of the galvanized steel from Ohio were missing (Tr. 8-9). A forklift had apparently been used to remove the steel from the warehouse (Tr. 11, 18, 21).

At approximately 1:00 or 2:00 A.M. on the morning of April 5, 1975, petitioner, an independent truck operator, unloaded the six steel coils at the Astro Value Supply Company yard in Houston (Tr. 65, 76-77, 80). At about 1:00 P.M. that day, petitioner and Robert Denley, an employee, reloaded the steel onto a truck and took it to a warehouse (Tr. 87-91). It was there reloaded onto two trucks belonging to the Allstate Trucking Co. (Tr. 108-109, 116, 127), and taken to the Allstate Trucking Co. depot, where the trucks were parked with the steel still aboard.

The steel coils were identified by the consignees on April 8, 1975 (Tr. 116-117, 127, 135, 149).

Petitioner was interviewed by William Russ, a special agent of the Federal Bureau of Investigation, on April 19, 1975. After being advised of his rights, petitioner denied any knowledge of the theft and denied moving the steel on April 5, 1975 (Tr. 149-152). Russ again interviewed petitioner on April 22, 1975. After being again informed of his rights, petitioner altered his story. He stated this time that on April 1, 1975, he had been approached by a person named George who asked to borrow petitioner's truck. According to petitioner, George explained that his truck had broken down and that he needed to move and store some coils. Petitioner stated that he moved the coils to Astro Value, for which he was to receive \$300 from George. Petitioner did not receive the \$300 and he subsequently concluded that the goods must have been stolen since they had not been removed from Astro Value. Petitioner then decided to sell the steel. On April 5, 1975, petitioner told Russ, he moved the coils to a warehouse where they were to be sold (Tr. 152-165).

ARGUMENT

1. We agree that petitioner was improperly convicted under 18 U.S.C. 659 for both theft and possession of the same goods. As we noted in Solimine v. United States, No. 76-72, vacated and remanded December 6, 1976, we believe that the rationale of this Court in United States v. Gaddis, 424 U.S. 544, barring multiple convictions under 18 U.S.C. 2113 for bank robbery

and possession of the proceeds of that robbery, applies also to multiple convictions under 18 U.S.C. 659 for theft from an interstate shipment and possession of the proceeds of that theft.

In Gaddis, this Court held that where the evidence showed that defendants were the robbers, and that any possession of the proceeds derived from that fact, no new trial was required, since the conviction on the possession count could simply be vacated on appeal. For the reasons noted in our brief in opposition to the petition for certiorari in Sellers v. United States, No. 76-5485, certiorari denied, January 25, 1976, the same result now follows where the jury has returned a verdict of guilty on both the robbery and possession counts. ^{1/} Accordingly, we do not oppose a grant of the petition for the limited purpose of remanding the case to the district court to vacate the convictions imposed for possessing goods stolen in interstate commerce.

2. The remainder of petitioner's contentions are without merit. ^{2/}

^{1/} We are sending petitioner a copy of our brief in Sellers.

^{2/} In addition to the claims discussed in the text, petitioner contends, in an "exhibit" received in this office on September 22, 1976, that he was not properly apprised of his rights under Miranda v. Arizona, 389 U.S. 436, since he did not sign a written waiver. This claim is entirely without basis. Petitioner was not in custody when he made the statements summarized above at page 4. Further, this Court has never suggested that Miranda requires a written waiver.

Petitioner also apparently contends in the "exhibit" that the evidence was insufficient to sustain his conviction. There is no reason for this Court to review the essentially factual determination in the trial court, which was affirmed by the court of appeals, that the evidence warranted petitioner's conviction.

a. Petitioner was charged under 18 U.S.C. 659 with theft of goods from two separate interstate shipments. Petitioner urges that he cannot be convicted and sentenced on separate counts under 18 U.S.C. 659 because the goods at issue were taken at a single time, and from a single place. The question is one of statutory construction; if Congress so intends, one transaction may constitute multiple offenses. Ebeling v. Morgan, 237 U.S. 625 (cutting of several mail bags taken from same car constitutes multiple offenses), Barringer v. United States, 399 F. 2d 557 (C.A. D.C.), certiorari denied, 393 U.S. 1057 (robbery of two persons at same time constitutes two offenses).

Section 659 proscribes the stealing of goods "moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property." While Congress could have made each transaction involving taking of goods in interstate commerce a single offense, the language of the statute indicates that Congress did not do so. Rather, it gave maximum protection to each individual interstate shipment by making each unauthorized taking of goods which "constitute" an interstate shipment, or part thereof, a separately punishable offense. See Oddo v. United States, 171 F. 2d 854, 856-858, (C.A. 2), certiorari denied, 337 U.S. 943 (theft of different interstate shipments in a single truck constitutes separate violations of 18 U.S.C. 409 [now 18 U.S.C. 659]), United States

v. DeNormand, 149 F. 2d 622, 624-625, (C.A. 2), certiorari denied, 326 U.S. 756 (theft at single time of two trucks containing interstate shipments constitutes two separate offenses under 18 U.S.C. 409).

Petitioner, accordingly, was properly convicted and sentenced for two thefts from two interstate shipments.

b. Petitioner claims that his prosecution under federal law is barred because the acts of which he was convicted also violated state law (Pet. 7a-7b). ^{3/} This claim was not raised in the court of appeals and therefore should not be considered now. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2, and cases cited therein. In any event, it is without merit. There has been no state prosecution in this case, and even if there had been, the federal government would not be precluded from prosecuting petitioner under federal law. Abbate v. United States, 359 U.S. 187.

Petitioner seeks also to invoke the policy of the Department of Justice against prosecuting individuals already convicted by the courts of a state for crimes involving the same acts on which the state convictions is based. See Hayles v. United States, 419 U.S. 892, Ackerson v. United States, 419 U.S. 1099.

^{3/} Petitioner also claims (Pet. 8-10) that the trial court erred in instructing the jury concerning scienter necessary for conviction of possession of stolen goods. At petitioner's request, the trial transcript did not include the judge's instructions to the jury (Tr. 183). Petitioner should not now be heard to complain of those instructions, since, as a result of his action, they are no longer available for review. If the conviction for possession of stolen goods are vacated, this issue is moot in any event.

The policy that petitioner cites would not apply in this case since there has been no state prosecution. Further, that policy does not create any right in defendant not to be prosecuted; rather, it is a housekeeping policy which sets out a general rule to which exceptions can be made in appropriate cases by the Department. See, United States v. Hutul, 416 F. 2d 607, 626 (C.A. 7), certiorari denied, 396 U.S. 1012.

c. Petitioner contends for the first time in this Court (Pet. 10-12) that the grand and trial juries in his case were illegally selected because they were drawn from the list of registered voters. The claim is therefore not properly before this Court. Adickes v. S.H. Kress & Co., *supra*. Moreover, any challenge to the composition of the grand or petit jury was waived when it was not brought by pretrial motion pursuant to Rule 12(b)(2), Fed.R.Crim.P.; facts concerning jury selection were well known and available to petitioner in the exercise of due diligence before trial. Shotwell Mfg. Co. v. United States, 371 U.S. 341. In any event, petitioner's claim is without merit. The Jury Selection and Service Act of 1968 allows the use of voter registration lists in selecting jurors for federal courts, and provides that use of additional sources will be the exception rather than the rule, 28 U.S.C. 1863(b)(2). The use of voter registration lists has been repeatedly approved. See, e.g., United States v. King, 492 F. 2d 895 (C.A. 8); United States v. Dellinger, 472 F. 2d 340, 364-366 (C.A. 7), certiorari denied, 410 U.S. 970; United States v. Ross, 468 F. 2d 1213, 1216 (C.A. 9),

certiorari denied, 410 U.S. 989; Simmons v. United States, 406 F. 2d 456, 462-463 (C.A. 5), certiorari denied, 395 U.S. 982. Petitioner suggests no basis for a different result here. He does not claim that the voter registration lists used in selecting the juries reflected discriminatory practices, or that use of the lists resulted in systematic exclusion of any identifiable group within the community.

CONCLUSION

The petition for a writ of certiorari should be granted for the limited purpose of remanding the case to the district court for consideration in light of this Court's disposition of Solimine v. United States, supra. In all other respects, the petition should be denied.

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